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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HOWARD DENNIS GARRETT,

Petitioner,

v.

THE STATE OF ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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QUESTION PRESENTED

Should the Arkansas Supreme Court have granted a review of the conviction of Howard Dennis Garrett for battery in the first degree?

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HOWARD DENNIS GARRETT,

Petitioner,

v.

THE STATE OF ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The petitioner, Howard Dennis Garrett, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on March 18, 1985.

OPINION BELOW

The denial of appeal, not reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered March 18, 1985, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are set forth in Appendix "F."

STATEMENT OF FACTS

Defendant, Howard Dennis Garrett, was tried twice and convicted of battery in the first degree following an incident in which Diane Burr, his former lover and business partner, was shot and injured. Both juries returned a sentence of ten years with a maximum of twenty years.

Certain acts which occurred before the injury of May 22, 1981 were proposed as evidence. Diane Burr accused the defendant of kidnap and rape which allegedly occurred March 11, 1981 through March 13, 1981. These unfounded charges were dismissed before trial. At the first trial, defense attempted to prove that Ms. Burr manufactured those charges in an attempt to show bias of the witness. The trial court ruled this to be impeachment on a collateral matter and disallowed both the extrinsic testimony and a cross exam of Ms. Burr as to this matter.

The Arkansas Appellate Court ruled that the testimony amounted to impeachment on a collateral matter but reversed for the trial court's refusal to allow questions of Ms. Burr on cross examination for impeachment purposes.

Conversely, at the second trial, the prosecution first introduced the testimony of Ms. Burr accusing the defendant of the kidnap and rape over defense objections to relevancy. The trial court ruled the testimony of Ms. Burr was relevant to show defendant's intent, plan, motive, or design. Subsequently, defendant attempted to introduce testimony of Sancha Anderson, Patty White, and Gary Amstutz to refute Ms. Burr's analysis of the facts of her trip with defendant to Tulsa which she had labeled a kidnap and rape.

During an in-camera consultation with counsel, the judge asked if this wasn't the reason for the reversal of the first trial not recognizing the distinction in form and justification of the proffered testimony. The trial judge, thus, was confused by the ruling of the Appellate Court and erroneously concluded that the evidence proferred by defendant was irrelevant as impeachment on a collateral matter. Thus, the defendant was not allowed to rebut a major contention of the prosecution's case in chief.

In addition, Ms. Burr was permitted, over objection, to testify to an incident of an exchange of angry words between she and defendant which occurred outside an ice cream parlor owned and operated by defendant and Ms. Burr. As a result of this altercation, the defendant was arrested for disturbing the peace and assaulting a police officer.

Voir dire in the second trial is marked by repeated prosecution reference to the length of time between arrest and trial. Defense objections to such questions were sustained and repeatedly ignored by the prosecutor in an apparent attempt to impress upon the jury, through implication, that the defendant had been tried before on the same question.

During the cross examination of Robert Harrison, the prosecutor asked when he last worked for the defendant. The witness responded that it was in 1982, after the *first trial*. Defendant's motion for mistrial, following this express reference in open court to the earlier trial, was denied.

Additional facts will be incorporated into the argument.

REASONS FOR GRANTING THE WRIT

I

EXTRINSIC EVIDENCE OF PRIOR OFFENSES WAS IRRELEVANT AND THEREFORE WAS ERRONEOUSLY ADMITTED AT THE TRIAL IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The due process clause of the Fifth Amendment to the United States Constitution guarantees a criminal defendant a full and fair trial. The admission of irrelevant evidence in a criminal trial is a violation of the defendant's due process rights. Extrinsic evidence that serves no other purpose than to depict the defendant as a person of bad character addicted to crime, *Alford v. State*, 223 Ark. 330, 266 S.W.2d 804 (1954), charged, the admission of which violates the defendant's due process rights.

Admissibility of extrinsic act evidence must be determined through a two-step approach as described in *Golden v. State*, 10 Ark.App. 362, 664 S.W.2d 496 (1984): (1) The act must bear some independent relevance to the issues presented by the case and (2) the evidence must pass a balancing test of probative value versus unfair prejudice of the information.

In the case at bar, the defendant was charged with first degree battery. At the trial, over the defense objections, the prosecution was allowed to introduce evidence of the circumstances surrounding a prior conviction for disturbing the peace and assaulting a police officer and unfounded charges of kidnap and rape that were later dismissed. The prosecution asserts that this extrinsic act evidence was relevant to show a plan, motive, or design which established the specific intent required for First Degree Battery.

First Degree Battery is defined as:

> **41-1601. Battery in the first degree.**—(1) A person commits battery in the first degree if:
>
> (a) with the purpose of causing serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon; or
>
> (b) with the purpose of seriously and permanently disfiguring another person, or of destroying, amputating or permanently disabling a member or organ of his body, he causes such an injury to any person; or
>
> (c) he causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life; or. . . .

One element of First Degree Battery is the intent to inflict serious physical injury. Such intent is indicated when a defendant acts purposely with a culpable state-of-mind, *Bolden v. State*, 267 Ark. 504, 593 S.W.2d 156 (1980). "A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result." Arkansas Evidence Code Section 41-203(1). However, the culpable mental state required is more than recklessness. *Nolen v. State*, 278 Ark. 17, 643 S.W.2d 257 (1982).

Federal Rules of Evidence 404(B) allows evidence of other crimes, wrongs or acts to show motive, opportunity, intent, or plan. However, where defendant's intent to commit the charged offense is in issue, extrinsic evidence is only relevant if the defendant had the same state-of-mind in the perpetration of both the extrinsic and the charged offense. *U.S. v. Beechum*, 582 F.2d 898 (5th Cir. 1978). The evidence admitted here of a conviction for disturbing the peace and assaulting a police officer showed only that the defendant displayed a raucous and unbehaved demeanor. His state-of-mind clearly did not approach the calculated and

wanton mental state required to show a willingness that serious bodily injury might result.

At best, the acts of the defendant show recklessness which does not approach the same state-of-mind required for First Degree Battery. Thus, the evidence of this prior conviction does not reflect connection to the specific intent required for burglary and can not be admitted for this purpose.

To establish relevancy of extrinsic offenses, the trial court must first determine whether there is enough evidence to allow the jury to find that defendant committed the extrinsic offense. *U.S. v. Dothard*, 666 F.2d 498, 501-502 (11th Cir. 1982). The charges of kidnap and rape were dismissed at the preliminary hearing, there being no factual basis other than an unfounded accusation by Diane Burr. Thus, there was insufficient evidence to show that the defendant committed the extrinsic offenses and at trial evidence of these extrinsic offenses was improperly admitted.

In addition, the evidence of these prior offenses was very prejudicial in that it did, in fact, cast the defendant in the light of a man of bad character and from that presumption, more likely to have committed the crime with which he is presently charged. Thus, the probative value of the extrinsic conviction was substantially outweighed by the danger of unfair prejudice. *Golden v. State*, 10 Ark.App. 362, 664 S.W.2d 496 (1984), *U.S. v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978).

The only relevance of the evidence offered as probative of motive or design was to show that defendant is a man of bad character, addicted to crime and should, therefore, not have been admitted. *Alford v. State*, 223 Ark. 330, 266 S.W.2d 804 (1954).

A more recent Arkansas case may appear to extend the situation where such extrinsic evidence will be allowed. The court, in *Lair v. State*, ____ Ark. ____, 675 S.W.2d 361 (1984), admitted statements made by a defendant to a victim just before the rape

charged. The statements related previous rapes of other women. The court held that the state was entitled to introduce evidence showing all circumstances which explain the act, show a motive for acting, or illustrate the accused's state-of-mind even if other criminal offenses are brought to light.

The extrinsic evidence in the case at bar differs markedly from *Lair*, however, as it does not involve statements by the defendant, but, instead contains allegations of rape and kidnap which were summarily dismissed.

And, as such, *Lair's* holding should not be followed because evidence introduced regarding the conviction for disturbing the peace and assaulting a police officer fails to show the accused's motive or state-of-mind. Finally, this Arkansas decision is in conflict with the United States Supreme Court decision in *U.S. v. Beechum, supra.*

II

THE DEFENDANT'S PROFFERED EVIDENCE REGARDING THE ALLEGED PRIOR KIDNAPPING AND RAPE WAS OFFERED TO REBUT THE STATE'S KIDNAPPING AND RAPE THEORY OF DESIGN AND MOTIVE AND NOT AS IMPEACHMENT BY "OTHER" BAD ACTS EVIDENCE AND THEREFORE WAS ERRONEOUSLY DISALLOWED IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

If the court should determine that evidence of the alleged kidnap and rape of Diane Burr was indeed relevant and indicative of motive or design then it was error to disallow defendants proffered evidence refuting Ms. Burr's allegations. The in-camera testimony of Soncha Anderson, Gary Amstutz, and Patty White was not allowed by the Triai Court due to the Trial Court's erroneous

belief that the testimony was offered as impeachment of the witness, Diane Burr, on a collateral matter. In point of fact, such evidence was offered to contradict and disprove a material part of the prosecution's case in chief, the element of intent, motive or design, and not collaterally to impeach her testimony asserting "other bad acts;" the element of intent, motive or design and should have been allowed. *Hawksley v. State*, 276 Ark. 504, 637 S.W.2d 573 (1982).

"The Federal Rules of Evidence discourage the admission of extrinsic evidence to prove or disprove issues which are collateral to the subject matter of the case (Federal Rules of Evidence 403) . . . however, if the evidence contradicts *material* testimony, then it is relevant evidence and is no longer considered collateral." *U.S. v. Russell*, 717 F.2d 518 (11th Cir. 1983). When a party in the examination in chief is allowed to inquire about collateral acts, such testimony may be contradicted. *Howell v. State*, 141 Ark. 487, 489, 217 S.W. 457 (1920).

In *Hawksley, supra*, the defendant attempted to introduce testimony concerning travel plans, including plane reservations, of defendant and the victim which were made about two weeks prior to the altercation and evidence as to payment of a commission he gave to the victim about two months before the incidents of the crime charged. The *Hawksley* court held the evidence as to their joint plans together and the said commission was relevant to rebut the state's theory that the defendant committed the crime because the victim was trying to break up their relationship. The evidence presented by the defendant tended to show a continuing relationship and to dispute the prosecution's theory of defendant's intent, plan, motive or design.

In the case at bar, the prosecution's witness, Diane Burr, testified as to the circumstances surrounding the unproved, dismissed charges of kidnap and rape. The defense witnesses' testimony would have shown that, at the same point in time, the

defendant and Diane Burr enjoyed a relaxed, close and consensual relationship and in fact were planning a honeymoon trip.

Thus, the defense's proffered testimony as such, should have been admitted for the purpose of rebutting the state's theory of intent, motive or design. The Arkansas courts failure to admit this rebuttal evidence constituted a denial of the defendant's due process rights in violation of the Fifth Amendment.

III

THE FAILURE OF THE DEFENSE COUNSEL TO FILE A TIMELY APPEAL CONSTITUTED A VIOLATION OF DEFENDANT'S RIGHT TO EFFECTIVE COUNSEL UNDER ARTICLE 2, SECTION 10 OF THE ARKANSAS CONSTITUTION WHICH RESULTED IN A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Article 2, Sec. 10 of the Arkansas Constitution guarantees a criminal defendant the right to counsel:

> "In all criminal prosecutions the accused shall enjoy the right to . . . be heard by himself and his counsel." ARK. CONST., Art. II, Sec. 10.

"A failure to perfect an appeal in a criminal case where the defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel. *Surridge v. State*, 276 Ark. 596, 637 S.W.2d 507 (1982). *Henderson v. State*, 278 Ark. 107, 643 S.W.2d 541 (1982).

In the case at bar, defendant requested that his attorney file an appeal. However, his attorney belatedly filed the notice of appeal and the Arkansas Court of Appeals denied a hearing based upon the failure to file a timely appeal. The Arkansas Supreme Court

affirmed the Appellate Court ruling. The defendant's attorney has admitted, in an affidavit to the Arkansas Supreme Court, that the failure to timely file was due to his error in misinterpreting the date on which the statutory time for appeal began to run.

The attorney's failure to file an appeal in the case at bar denied the defendant the right to effective counsel in violation of the Arkansas Constitution. *Surridge, supra*; *Henderson, supra*. Where, as here, defendant in a state court is denied a right guaranteed by that state's own constitution, the defendant's due process rights under the Fourteenth Amendment to the United States Constitution are violated. *Siegal, supra*; *Collins, supra*.

IV

THE FAILURE OF THE ARKANSAS COURTS TO HEAR THE DEFENDANT'S APPEAL IN DIRECT CONTRAVENTION OF THE ARKANSAS SUPREME COURT HOLDING IN RE BELATED APPEALS VIOLATED DEFENDANT'S DUE PROCESS RIGHTS UNDER THE FOURTEEN AMENDMENT TO THE UNITED STATES CONSTITUTION.

A belated appeal based upon attorney error will be heard by the Arkansas Supreme Court in a per curiam opinion even where no good cause in the error was shown. *In Re Belated Appeals in Criminal Cases*, 265 Ark. 964, decided 5 February 1979, which cited Arkansas Rule of Criminal Procedure 36.9 in support of the decision. In fact, the Arkansas Supreme Court has routinely granted belated appeals where the defendant did not waive his right to an appeal and such request for appeal was communicated to defendant's attorney. *In Re Belated Appeals in Criminal Cases, supra*.

In the present case, the defendant had requested, soon after the trial ended, that his attorney perfect an appeal and he has

steadfastly continued to assert such request. Thus, he has, at no time, waived his right to appeal. However, the Arkansas Supreme Court refused to hear the defendant's appeal.

The Arkansas courts' failure to hear defendant's appeal violated both legislative mandate and the Arkansas Supreme Court's own opinion. A failure to follow legislative mandate and the court's own procedure constitutes a violation of the defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. *United States Ex Rel Siegal v. Follette*, 290 F.Supp. 632, 635 (1968); *United States Ex Rel Collins v. Jozwiak*, 315 F.Supp. 188, 190 (1970).

V

THE PROSECUTOR'S REPEATED REFERENCE DURING VOIR DIRE TO THE FIRST TRIAL WAS IMPROPER AND CONSTITUTED PROSECUTORIAL MISCONDUCT, WHICH RESULTED IN A VIOLATION OF DEFENDANT'S RIGHTS UNDER THE ARKANSAS CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO A FAIR AND IMPARTIAL JURY.

Article 2, Section 10 of the Arkansas Constitution guarantees: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." A jury, to be impartial, must decide the merits of the case "by hearing the testimony adduced before them at the trial and after they enter the trial panel--not before." *Lane v. State*, 168 Ark. 528, 270 S.W. 974 (1925). The standard of fairness required by the United States Constitution, similarly, includes a panel of impartial and indifferent jurors. *Murphy v. Florida*, 421 U.S. 794 (1975). Once the jury learned of an earlier conviction, it would no longer be impartial and indifferent.

The prosecutor is an officer of the court and should see that the defendant has a fair and impartial trial, avoid convictions contrary to law, not appeal to the prejudice of the jury, nor make statements to the jury which are not proved. *Adams v. State*, 176 Ark. 916, 5 S.W.2d 946 (1928). As an officer of the court, the prosecutor should not bring to the jury matters not proper for their consideration, *State v. Comes*, 245 Iowa 485, 62 N.W.2d 753 (1954), nor subject the defendant to an unfair trial. *Homan v. U.S.*, 279 F.2d 767 (C.A. Neb. 1960), *cert. den.* 364 U.S. 866.

In the case at bar, the prosecutor made repeated reference to the length of time between the arrest and this trial in an apparent attempt to impress upon the jury that the delay was caused by an intervening trial. This would raise the curiosity of the prospective jurors who might seek further information and discover the earlier conviction. Indeed, a reading of the voir dire transcripts indicates the answer to that question was known among their own ranks for the prosecutor stopped one juror, Dorothy Rise, who was attempting to ask about the earlier trial.

The conduct of the prosecutor amounted to prosecutorial misconduct and denied the defendant his rights under the Arkansas Constitution (Art. 2, Section 10) and the Sixth Amendment to the United States Constitution to a fair and impartial jury.

VI

THE DEFENDANT'S MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED FOLLOWING THE TESTIMONY OF ROBERT HARRISON WHO EXPRESSLY REFERRED TO THE EARLIER TRIAL. THE DENIAL OF SUCH MOTION FOR MISTRIAL CONSTITUTED A VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

"A jury to be impartial must have the impressions of the merits of the cause written or stamped on their minds by hearing the testimony." *Lane v. State*, 168 Ark. 528, 270 S.W. 974 (1925). The testimony of Mr. Harrison informed the jury that the defendant had once before been convicted of this crime and encouraged them to disregard their own impressions and follow the earlier ruling.

VII

THE PROSECUTOR'S REFERENCE TO PUNISHMENT ONLY AT THE TIME OF THE CLOSING ARGUMENT DENIED THE DEFENDANT THE RIGHT TO RESPOND TO ALL CONTENTIONS AGAINST HIM AND AS A RESULT VIOLATED THE DEFENDANT'S RIGHT TO FAIR TRIAL AS GUARANTEED BY THE LAWS OF ARKANSAS AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Arkansas Criminal Procedure Statute Section 43-2132, states in pertinent part: ". . . if upon the demand of the adverse party, the attorney prosecuting for the State, or the attorney for the defense shall refuse to open and fully state the grounds on which he claims a verdict, the party so refusing shall be refused the conclusion of

the argument." The statute confers upon the party having the burden of proof the privilege of concluding the argument provided he makes a full and fair opening of his case. *Burrow v. State*, 109 Ark. 365, 159 S.W. 1123 (1913).

Thus by implication, though not specifically stated by the Arkansas Supreme Court, should the prosecution delete a particular element such as mention of punishment it should be prevented from discussing punishment in its closing argument. To allow defense a proper response to issues presented at trial, the prosecution should not be allowed to introduce in its closing arguments anything which has not properly been introduced at trial. *Simons v. State*, 233 Ark. 616, 346 S.W.2d 197 (1961).

In the case of *State v. Peterson*, 423 S.W.2d 825 (1968), defendant was convicted of burglary and sentenced to three years. The crime carried a maximum penalty of ten years. The Prosecutor failed to mention punishment in his opening argument as did defense counsel. In the closing argument the prosecution asked for the maximum penalty. The Missouri Supreme Court ruled it was an abuse of discretion to overrule defense motion for a mistrial. In so ruling the court noted, "it has been generally recognized in civil cases it is error for counsel who has the burden of the issues to omit all argument of injuries and damages in his opening argument and to cover those matters in his concluding argument, thus depriving the defendant of all opportunity to fairly answer that argument" (*State v. Peterson*, 423 S.W.2d at ____).

In the case at bar the prosecution did not argue punishment in its opening statement, nor make any mention of it in the initial closing argument. Defense counsel requested an instruction that the prosecution be prohibited from discussing punishment in its' closing argument. The court refused any restriction and, despite defense abstention from comment on punishment, the prosecution asked the jury to impose the maximum penalty. Thus, defendant was deprived of the right of confrontation on that issue and of the ability to answer the prosecution's argument. In violation of

defendant's rights. *State v. Peterson*, 423 S.W.2d 825; *State v. Hamric*, 151 S.E.2d 252, 151 W.Va. 1; Vol. 23A CJS Criminal Law Section 1089.

Since the prosecutor in the case at bar failed to mention punishment in his opening statement and that fact was called to the attention of the court by defense counsel, the prosecutor should not have been allowed to discuss punishment in his closing argument, which resulted in a violation of defendant's due process rights (*Douglas v. State of California*, 372 U.S. 353 (1963)). In addition, to force defendant to introduce punishment for the first time may create the impression thereby that he admitted guilt, at least by implication. (*State v. Peterson*, 423 S.W.2d at 830.)

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Arkansas Supreme Court.

DATED: May 15, 1985

Respectfully submitted,

BUFORD WILEY

Attorney for Petitioner

APPENDICES

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS. } SCT.

In the Supreme Court }

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A. D. 1984, amongst others were the following proceedings, to-wit:

On the 18th day of March, A.D. 1985, a day of said term

HOWARD DENNIS GARRETT

APPELLANT } Appeal from Benton

Circuit Court

No. vs. } District

STATE OF ARKANSAS

APPELLEE }

Appellant's motion to file a belated Petition for Review is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 19th day of March, A.D. 1985.

Dona L. Williams
CLERK

By_____
D. C.

original to Clerk

cc: Michael R. Salamo
Lynn H. Ball
Theodore Holder

IN THE ARKANSAS SUPREME COURT

HOWARD DENNIS GARRETT APPELLANT

VS. NO. CA. CR. 84-43

STATE OF ARKANSAS APPELLEE

MOTION TO FILE LATE PETITION FOR CERTIORARI

Now comes appellant, Howard Dennis Garrett, by and through his attorney of record, Michael R. Salamo, and for his Motion to File Late Petition for Certiorari in the above styled cause states:

1. That on February 19th, 1985, Appellant's attorney tendered to the Court a Motion entitled PETITION FOR CERTIORARI. That said Motion was refused due to the fact that it was untimely filed.

2. That the attorney herein had misread Rule 20 and Rule 29 (6), Rules Of The Supreme Court, to mean that the Petition For Certiorari should be filed after the Petition for Rehearing.

3. That this is a criminal appeal and Appellant should not be required to pay the price of a refusal to file said petition because his attorney misunderstood the procedure herein.

4. Where an attorney tenders a record, which on its face is untimely filed this Court has allowed said record to be filed if a Motion For Rule On The Clerk is granted. Rule 5, Rules Of The Supreme Court. Also, where the abstract and brief have been filed untimely this Court has allowed said brief to be filed with the Court. In either event this Attorney takes full blame for the Petition for Certiorari's not being tendered timely.

FILED
MAR 01 1985
DONA L. WILLIAMS
CLERK

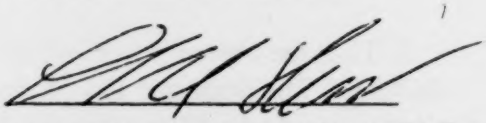
5. Appellant further gives as cause for late filing that appellant's health at this time is in serious jeopardy and he needs expert medical attention. He intends to appeal his case to the United States Supreme Court and desires that this Court allow his late filing and order the Court of Appeals to recall its mandate so the appellant can remain free on bond to pursue his appeal and to get the medical care he needs.

6. That a copy of said Petition is attached hereto and marked Exhibit 1, and a declaration of co-counsel Lynn H. Ball is attached hereto marked Exhibit 2 and incorporated herein.

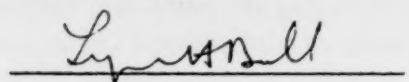
WHEREFORE, Appellant respectfully prays that this Court allow his Petition for Certiorari be filed with the Court.

Respectfully submitted,

Howard Dennis Garrett

By 

Michael R. Salamo 28 Feb 85
Attorney at Law
17 1/2 East Center
Fayetteville, AR 72701



Lynn H. Ball
530 "B" St, Suite 1810
San Diego, CA 92101

Of counsel 28 Feb 85

IN THE ARKANSAS SUPREME COURT

HOWARD DENNIS GARRETT APPELLANT

VS. NO. CA CR 84-43

STATE OF ARKANSAS APPELLEE

PETITION FOR CERTIORARI

Comes now the Appellant, Howard Dennis Garrett, and for his Petition for Certiorari in the above styled cause states:

1. That this petition requests review of the decision of the Court Of Appeals in the above styled cause, and the Court Of Appeals denial of Appellant's Petition for re-hearing; and is brought pursuant to Rule 29 (6), Rules Of The Supreme Court.

2. That Appellant was convicted of Battery in the First Degree, a Class B felony. This is the second appeal in this matter. In an unpublished opinion, *Garrett v. State*, CA CR 82-156 (March 30, 1983), the Court of Appeals reversed Appellant's first conviction on other grounds and in doing so held that Appellant could not introduce evidence of an alleged kidnapping and rape some five or six months before the battery occurring on May 22, 1981, because the matter was collateral, although said evidence was rebuttal to the States case.

3. The State introduced various alleged altercations between the Appellant and the victim, including but not limited to some of which occurred only days and/or weeks after the alleged kidnapping and rape.

4. The Court of Appeals affirmed Appellants second conviction and ruled the extrinsic act offenses admissible as probative of the Appellant's motive, intent, preparation, plan, and absence of mistake or accident, in that, taken as a whole the evidence offered

proof that Appellant harbored strong feelings against the victim for a considerable period of time before shooting her and that through vindictiveness intended to cause her physical injury. *Garrett v. State*, CA CR 84-43.

5. That the Court of Appeals decision in the two above cited cases are inconsistent in that they draw a fine line of distinction between what is collateral and what is relevant to intent, motive, etc., and as such violates the due process and equal protection clause of the United States, and Arkansas Constitution and Rules 403 and 404, Uniform Rules of Evidence.

6. That the States case in chief consisted of several alleged altercations between the Appellant and the victim from January, 1981 through May 22, 1981, the date of the shooting. This evidence included an alleged rap [*sic*] and kidnapping of the victim by the Appellant in Tulsa, Ok. The Appellant had witnesses prepared to testify to facts which would have clearly have contradicted the victims testimony involving this incident, and would have also shown a pattern on the victims part to falsely accuse the Appellant of committing a crime.

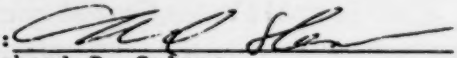
7. That the Trial Court was confussed [*sic*] by the Court Of Appeals ruling from the first conviction in this matter and that confussion [*sic*] aided in the prejudice to the Appellant.

8. That if the evidence, taken as a whole, demonstrates a pattern of hostility on Appellants part, then evidence of an alleged rape and kidnapping should not be collateral and as such evidence which contradicts the same would not be collateral.

WHEREFORE, Appellant respectfully prays that this Court grant his petition for certiorari, as the issue involves constitutional rights as well as a legal principle of major importance.

Respectfully submitted,

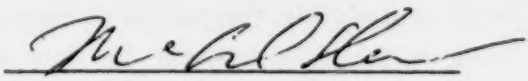
HOWARD DENNIS GARRETT,
APPELLANT

By: 

Michael R. Salamo
Attorney at Law
17 1/2 East Center, Suite 216
Fayetteville, Arkansas 72701

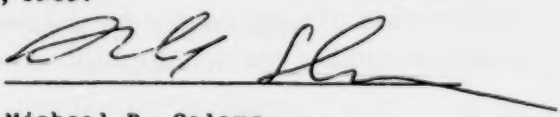
CERTIFICATE OF COUNSEL

I, Michael R. Salamo, attorney for Appellant, certify that the above Petition For Certiorari is filed in good faith with the belief that Appellant's claim has merit and is not filed for the purpose of delay.



CERTIFICATE OF SERVICE

I, Michael R. Salamo, certify that I have caused to be deposited in the U.S. Mails, postage prepaid, a true and correct copy of the foregoing Petition For Certiorari to Attorney General, Justice Building, State Capitol Grounds, Little Rock, Arkansas 72201, this 17th day of February, 1985.



Michael R. Salamo

DECLARATION OF LYNN H. BALL

I, Lynn H. Ball, after first being duly sworn state:

1. That Howard Dennis Garrett retained me to review his conviction and to assist with the preparation of the necessary documents for an appeal to the United States Supreme Court.

2. When I agreed to represent Mr. Garrett he explained to me his concern with being immediately incarcerated, as he was undergoing treatment for a deteriorating optical nerve condition. He was seeking treatment in Gainesville, Florida. He told me that he was referred to a clinic in Gainesville, Florida, by an opthomologist in Fayetteville, Arkansas, named Dr. Jim Sharp. Mr. Garrett saw a Dr. Hood and a Dr. Pollock at the clinic in Gainesville. They told him that his condition is deteriorating and that there is atrophy of his optic nerves which is progressing. They sternly warned Mr. Garrett tht he must have a Cat Scan performed by a neuro-opthomologist to determine what is causing the deterioration. They believe that lack of blood supply to the optic nerve is causing the difficulty and surmise that this is caused by either a brain tumor causing pressure which causes pinching of blood vessels, an aneurism which is causing the lack of circulation, or a blockage which is causing the circulation problem. The Cat Scan which must be performed will allow the neuro-opthomologist to look behind the back of the eyeballs and perhaps detect the problem. If the problem is detected, it may be correctable by surgery. The opthologists state that the optic nerves are dying and that the deterioration of sight cannot be restored, but only stopped if the condition causing the deterioration is corrected.

3. The specialist in Florida is expected to perform the necessary tests within the next week.

4. This declarant honestly believes that if Mr. Garrett is placed in custody at this time, he may very well lose his sight, which would certainly be cruel and unusual punishment. Although he is facing

ten years in the Arkansas State Penitentiary, he is a man only 32 years of age, and he still has a long life ahead of him. To incarcerate him and take a chance on him becoming totally blind without affording him the opportunity to seek this medical care while he can could very well violate his rights against cruel and unusual punishment. This declarant is a former practitioner in Florida and intends to travel to Florida and get a judge to appoint a physician to confer with the specialist and render an opinion pursuant to Arkansas Statute § 43-733, which statute states that a defendant may be excused from appearing if he is physically unable to do so as certified by a court appointed physician.

5. This declarant believes that the ends of justice will be served if Appellant is allowed to remain free on bail pending a determination of his physical condition, and that he be allowed to file his petition for a Writ of Certiorari with the Arkansas Supreme Court so that he can exhaust all of his legal remedies. This declarant believes that the State of Arkansas will not be prejudiced if this is allowed to occur; however, that the Appellant, Howard Dennis Garrett, will be severely prejudiced if the Motion is not granted.

The foregoing statement is sworn to under penalty of perjury under the laws of the State of Arkansas and was executed on this 20th day of February, 1985, in Fayetteville, Ark.

Lynn M. Ball

CERTIFICATE OF COUNSEL

I, Michael R. Salamo, attorney for appellant, certify that the above Motion is filed in good faith with the belief that appellant's Motion has merit and as such is not filed for the purpose of delay.

Michael R. Salamo

CERTIFICATE OF SERVICE

I, Michael R. Salamo, certify that I have caused to be deposited in the U.S. Mails, postage prepaid, a true and correct copy of the foregoing Motion to File Late Petition for Certiorari to Attorney General, Justice Building, State Capitol Grounds, Little Rock, Ar. 72201, this ____ day of February, 1985.

Michael R. Salamo

CERTIFICATE OF SERVICE

I, Lynn H. Ball, certify that I delivered a true and correct copy of the foregoing Motion to File Late Petition for Certiorari to Attorney General, Justice Building, State Capitol Grounds, Little Rock, Arkansas on this 1 day of March, 1985.

Lynn H. Ball

NOT DESIGNATED FOR PUBLICATION.
SEE REVISED SUPREME COURT RULE 21.

ARKANSAS COURT OF APPEALS

No. CACR82-156

HOWARD DENNIS GARRETT	
APPELLANT	Opinion Delivered March 30, 1983
V.	AN APPEAL FROM BENTON COUNTY
STATE OF ARKANSAS	CIRCUIT COURT
APPELLEE	HON. W. H. ENFIELD, JUDGE
	REVERSED AND REMANDED

JAMES R. COOPER, Judge

The appellant was charged with first degree battery which resulted from a shooting incident between the appellant and his girlfriend. After a jury trial, the appellant was convicted and sentenced to ten years in the Arkansas Department of Corrections. From that decision, comes this appeal.

On March 22, 1981, the appellant and Diane Burr, with whom the appellant had previously lived, engaged in an altercation, which resulted in Diane Burr being shot in the stomach. To detail the background of the two parties would unnecessarily lengthen this opinion, but it is necessary to go into some detail regarding two prior incidents.

In January, 1981, Ms. Burr signed an affidavit which alleged that the appellant was guilty of disorderly conduct. Charges were subsequently brought against the appellant. In March, 1981, Ms. Burr signed a second affidavit which indicated that her former affidavit was false and that the police officer who arrested the appellant actually was the cause of the incident. On direct examination, Ms. Burr testified about the facts which led up to the January, 1981 incident as well as the fact that she had falsely signed an affidavit absolving the appellant of any responsibility for that incident. She was fully cross-examined concerning her false statement, and the appellant was allowed to impeach her credibility. On appeal, the appellant argues that he was denied the opportunity to adequately cross-examine the appellee to show her prejudice or bias against him because the trial court refused to allow him to introduce the second affidavit signed by Ms. Burr which absolved the appellant of responsibility in the January, 1981 incident. We disagree.

The credibility of any witness may be challenged on cross-examination. Arkansas Uniform Rules of Evidence, Rule 607. However, that rule does not allow the introduction of extrinsic evidence to test the credibility of the witness. We find no error in the trial court's refusal to allow the introduction of the second affidavit for the purpose of challenging the prosecuting witness' credibility.

Next, the appellant argues that the trial court refused to allow the testimony of various individuals concerning events which occurred in early March, 1981. Ms. Burr had filed a complaint indicating that the appellant had kidnapped her and had taken her to Fort Smith and then on to Tulsa where he raped her. Ms. Burr testified that while on the way to Fort Smith and Tulsa, she went into a store and purchased a note pad in order to write out an agreement, to be signed by the appellant and his ex-wife, which modified the child custody arrangement between them. The appellant sought to introduce a copy of that agreement, purportedly to show Ms. Burr's state of mind at the time she wrote the

statement. The appellant also sought to elicit testimony from witnesses who observed the appellant and Ms. Burr at a travel agency and at a restaurant and who would testify that Ms. Burr was not being held against her will. The trial court refused to allow the introduction of the statement, the testimony of the witnesses, and the cross-examination of Ms. Burr about the incident.

On appeal, the appellant alleges that the evidence and testimony were admissable [*sic*] to show bias and prejudice. While it is true that extrinsic evidence may be admissible to show the bias of a witness, *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978), it does not appear to us that the proffered evidence was probative of bias and/or prejudice. At best, it would go to the credibility of Ms. Burr. After the trial court refused to allow the appellant to introduce the statement or to put impeachment witnesses on the stand, the appellant sought to attack the credibility of Ms. Burr on cross-examination. Since the credibility of a witness is subject to attack on cross-examination, we hold that the trial court erred in refusing to allow the appellant to cross-examine Ms. Burr regarding the allegedly false statements concerning the alleged kidnaping [*sic*] and rape in March, 1981. We reverse and remand on this point.

Last, the appellant argues that the phrase "circumstances manifesting extreme indifference to the value of human life" is unconstitutionally vague and that an additional instruction defining the phrase should have been given to the jury. We disagree. This argument has been raised before and was laid to rest in *Martin v. State*, 261 Ark. 80, 547 S.W.2d 81 (1977).

Reversed and remanded.

Mayfield, J., concurs.

D-1

IN THE CIRCUIT COURT OF
BENTON COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

VS NO. CR-81-303

HOWARD DENNIS GARRETT DEFENDANT

JUDGMENT

NOW on this 10th day of August, 1983, this cause coming on to be heard, the State appearing by David Clinger, Prosecuting Attorney, and the Defendant, Howard Dennis Garrett, appearing in person and by his attorneys, Bobby Odom, Don R. Elliott, Jr., and Wm. R. Wilson, Jr., and the Defendant, having been previously arraigned and entered his plea of NOT GUILTY to the charge of Battery in the First Degree - Class B Felony, all parties announced ready for trial on the 10th day of August, 1983, and a jury of twelve from the regular panel of petit jurors were impaneled and sworn to try the cause, and, having heard the evidence, the instructions of the Court, and the arguments of counsel, retired to consider its verdict. The trial having lasted four days, the Jury, on the 13th day of August, 1983, returned into court a verdict of guilty.

Defendant, comes on now on this 13th day of August, 1983, ready for sentencing.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the Defendant, Howard Dennis Garrett, is guilty of Battery in the First Degree - Class B Felony, and that he be and is hereby sentenced to a term of TEN YEARS in the Department of Correction and a fine of TEN THOUSAND DOLLARS, payable within sixty days after his release from the Department of Correction.

Defendant is continued on his present bond pending appeal. Notice of appeal must be filed within thirty days.

W. H. Enfield

CIRCUIT JUDGE

ENTERED: 15 AUGUST 1983

FILED

At _____ O'Clock ____M.

AUG 15 1983

JOSEPHINE R. HEYLAND
Clerk and Recorder
BENTON COUNTY, ARK.

E-1

In Re: Belated Appeals in Criminal Cases

(Rule 36.9, Rules of Criminal Procedure)

PER CURIAM

February 5, 1979

PER CURIAM. In Re Belated Appeals in Criminal Cases. In *Harkness v. State*, 264 Ark. 561 (1978), where counsel for the appellant in a criminal case had miscalculated the 90-day limit for filing the record in this court, we explained that we were permitting the case to be docketed for the reason that otherwise the appellant would be in a position to obtain a new trial or a belated appeal on the basis of ineffective assistance of counsel. We have taken the same action in a number of other cases, but applications for permission to file such belated appeals are becoming much too numerous.

The controlling rule provides: "The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, *when a good reason for the omission is shown by affidavit.*" (Italics supplied.) Rules of Criminal Procedure, Rule 36.9 (1976). The purpose of the exception, to take care of hardship cases, is being disregarded, in that counsel tender out-of-time transcripts without a good reason for the delay. In order to put the responsibility where it belongs, on the shoulders of the lawyer who is at fault, hereafter when no good cause for the error is shown, the court will publish a per curiam order allowing the appeal, giving the name of the lawyer, and stating why no good reason has been shown for the omission. A copy of the order will be sent to the court's Committee on Professional Conduct, to be kept in its files for the Committee's information if any complaint of any kind should later be filed against that lawyer.

E-2

Donald Brian (Punk) HAWKSLEY,
Appellant,

v.

STATE of Arkansas, Appellee.

No. CR 82-86.

Supreme Court of Arkansas.

July 12, 1982.

HOLT, Justice.

A jury found appellant guilty of burglary, aggravated assault, criminal mischief, and two counts of battery and imposed sentences totalling ten years. All charges stem from an incident occurring around 7:30 a. m., February 27, 1980, when the appellant entered an apartment occupied by Cathy Chastain and Robert Clayton. A fight erupted. Chastain and Clayton received injuries requiring medical treatment.

We first consider appellant's argument that the court erred in admitting into evidence, over appellant's objections, proof of disorderly conduct, escape, and criminal mischief in the second degree which involved other persons and occurred several years prior to the incident here. During cross-examination of the appellant, the following exchange occurred:

> Q. Do you remember an incident in July of '77 in which you were convicted of escape and disorderly conduct and criminal mischief in the second degree?
>
> (Defense Counsel):
>
> Your honor, they have raised the issue of self defense . . . . This goes specifically to acts of conduct or misconduct . . . . This is for impeachment. They have raised the issue of self defense and I think I can show what he's been doing all his life, whether it has to do with violence . . . .

Following a colloquy between the state and the defense attorneys, the court overruled the objection, stating "It's an incident involving violence"; neither a conviction nor arrest makes any difference, and therefore, appellant could be asked about whether he was involved in violence in a particular incident.

The trial court erred in overruling appellant's objection, which we feel was sufficient. Rule 608(b) of the Uniform Rules of Evidence provides that the trial court may, if it finds good faith and the probative value of the testimony outweighs the prejudicial effect, allow questions about certain offenses if the misconduct relates to honesty and truthfulness. "Questions regarding appellant's violent nature and destruction of property are wholly unrelated to his propensity for honesty, and therefore, improper." *Divanovich v. State*, 271 Ark. 104, 607 S.W.2d 383 (1980). See McCormick, Evidence, § 43 (2d Ed. 1972); 3 Weinstein's Evidence § 608[05] (1981).

[1, 2] Rule 609 deals with impeachment by evidence of conviction of crime. Section (a) provides:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.

Thus, before the evidence of convictions of crimes was admissible the court had to be satisfied they were crimes either (1) punishable by imprisonment in excess of one year or (2) involved dishonesty or false statement. Once counsel raises the issue of whether the defendant's prior convictions should be excluded from trial, the trial judge has the duty to see that he is informed of the relevant considerations before admitting the evidence. Clearly, the disorderly conduct, § 41-2908, a class C misdemeanor, was not

admissible. Escape ranges from an admissible class C felony, first degree escape, § 41-2810 to an inadmissible class A misdemeanor, third degree escape, § 41-2812. Criminal mischief in the first degree, § 41-1906 can be admissible as a class C felony or inadmissible as a class A misdemeanor, depending on the value of the property destroyed. Criminal mischief in the second degree, § 41-1907, is an inadmissible misdemeanor. The state did not prove, nor did the trial judge make sufficient inquiry in the conference at the bench, to determine if the convictions were for crimes punishable by imprisonment in excess of one year and thus admissible into evidence.

The convictions were not admissible as convictions of crimes involving dishonesty and false statement. Those convictions are peculiarly probative of credibility and are always to be admitted without regard to grade of offense or length of sentence. Examples are perjury, subornation of perjury, criminal fraud and embezzlement. Thus, the prior convictions were not admissible for attacking the credibility of appellant under Rule 609.

[3] Neither was the evidence admissible under Rule 404 to prove a trait of character. First, appellant on direct examination did not testify to a character trait of non-violence and so no rebutting evidence was admissible. Rule 404(a)(1). Second, it was not admissible under 404(b) to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Two of the charges in the present case were battery in the first degree and aggravated assault. The testimony concerning prior crimes was not relevant to prove intent to commit the crimes charged. For a complete discussion of cases involving evidence admissible to prove intent see *Alford v. State*, 223 Ark. 330, 266 S.W.2d 804 (1954); and *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957). Here, the evidence of other crimes was not admissible and was prejudicial to the appellant.

We feel it necessary to discuss other contentions raised by appellant in view of a possible retrial. Appellant contends that the verdicts of guilty as to the charge of burglary and criminal mischief were not supported by the evidence, and the trial court erred in overruling his motion for a directed verdict on those counts. We cannot agree. In *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976), we said:

> It is well established that a directed verdict is only proper where there are no factual issue to be determined by the jury and on appeal, the evidence will be reviewed in the light most favorable to the appellee and the judgment will be affirmed if there is any substantial evidence to support it. *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975).

Substantial evidence is evidence which is of sufficient force that it will compel a conclusion one way or another beyond suspicion or conjecture. *Jones v. State*, 269 Ark. 119, 598 S.W.2d 748 (1980). In order for the state to prove the charge of burglary, it must show that the appellant entered or remained unlawfully in Chastain's apartment with the purpose of committing an offense punishable by imprisonment. Ark. Stat.Ann. § 41-2002 (Repl.1977) and Commentary. The appellant argues that admittedly he had a key to Chastain's apartment with the right to come and go as he pleased; that he kept some of his clothes there and spent several nights there each week; that he had contributed substantially to her financial support; that the fact they had previously lived together at other locations indicated that he had consent to enter her apartment; and also when he went in the apartment, it was "uncertain as to what he had in mind."

The day before the incident appellant inquired at Chastain's place of employment as to her whereabouts and was informed she had left with Clayton; that night Chastain received serveral threatening phone calls from appellant and finally she unplugged the phone; between the time Chastain and Clayton parked their cars outside Chastain's apartment and the fight the following morning, Clayton's car had been pushed sideways into Chastain's

vehicle, causing extensive damage to both cars; tire tracks near Clayton's car were made by tires similar to those on appellant's car; Clayton's car sustained approximately $1,500 damages; at approximately 7:30 a. m. appellant forcibly entered Chastain's apartment, splintering the door jam and forcing a chain lock from the wall; he observed Clayton in bed undressed; Chastain was in her night gown; the appellant was asked to leave; a fight broke out resulting in Chastain's and Clayton's injuries and medical treatment.

[4] We feel the evidence was sufficient for the jury to infer the appellant entered or remained unlawfully in Chastain's apartment with the intent to commit an offense punishable by imprisonment. We also find the evidence sufficient to enable the jury to infer that the appellant purposely destroyed or damaged the vehicles of Chastain and Clayton in excess of $500. Ark.Stat.ann. § 41-1906 (Repl.1977).

[5, 6] The appellant next contends the trial court erred in refusing to permit testimony concerning his and Chastain's plans and plane reservations to travel to Mexico which were made about two weeks prior to the altercation and in failing to allow appellant to introduce evidence as to a $1,100 commission he gave Chastain about two months before the incident here. We agree that the court should have permitted the evidence. The state attempted to show Chastain had been trying to "break up" her relationship with appellant. The evidence as to their plans to travel together and the real estate commission were relevant to rebut the state's theory. Uniform Rules of Evidence, Rule 402. Also evidence that a civil suit had been filed by Clayton against appellant as a result of the fracas had a bearing on the extent of the bias of the witness and was admissible. See *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978). In *Wright v. State*, 133 Ark. 16, 201 S.W. 1107 (1918), we said: "Pecuniary interest, personal affection or hostility, a quarrel or prejudice may always be shown to discredit a witness."

[7] Appellant asserts the trial court erred in admitting statements of Chastain, given to the investigating officers, to be introduced as "binding" on the appellant as direct evidence of wrongdoing on his part toward her and failing to limit the introduction of statements to impeachment purposes only. We find no merit in this argument. First, we observe that her transcribed statements were neither read to the jury nor introduced in evidence. Further, she and appellant have married since the incident involving the alleged offenses upon her and, understandably, she appeared to be a reluctant witness. The state merely read portions of her statements in questioning her on direct examination about her past relationship with appellant and his conduct toward her. She admitted that everything in her statements was true. We do not perceive that this procedure was "binding" upon appellant, and no error is demonstrated.

[8] We also find no merit in appellant's contention that the court erred in permitting Clayton to detail conversations concerning the relationship between Chastain and appellant that he had with Chastain out of the presence of the appellant. On cross-examination of Clayton, appellant's counsel asked Clayton whether Chastain "let you know she had this relationship with" appellant. We feel this opened the door for the later questions on redirect by the state concerning the status of their relations.

We deem it unnecessary to discuss any of the remaining contentions raised by appellant as they are not likely to reoccur in a new trial.

Reversed and remanded.

DECLARATION OF RIGHTS

§ 10. Rights of accused enumerated—Change of venue.—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which the crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of the accused, in such manner as now is, or may be, prescribed by law; and to be informed of the nature and cause of the accusation against him, and to have a copy thereof; and to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to be heard by himself and his counsel.

ARKANSAS CRIMINAL CODE

41-1601. Battery in the first degree.—(1) A person commits battery in the first degree if:

(a) with the purpose of causing serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon; or

(b) with the purpose of seriously and permanently disfiguring another person, or of destroying, amputating or permanently disabling a member or organ of his body, he causes such an injury to any person; or

(c) he causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life; or

(d) acting alone or with one or more other persons, he commits or attempts to commit a felony, and in the course of and in furtherance of the felony, or in immediate flight therefrom:

(i) he or an accomplice causes serious physical injury to any person under circumstances manifesting extreme indifference to the value of human life; or

(ii) another person who is resisting the offense or flight causes serious physical injury to any person.

(2) It is an affirmative defense in any prosecution under subsection 1(d) in which the defendant was not the only participant that the defendant:

(a) did not commit the battery or in any way solicit, command, induce, procure, counsel, or aid its commission; and

(b) was not armed with a deadly weapon; and

(c) reasonably believed that no other participant was armed with a deadly weapon; and

(d) reasonably believed that no other participant intended to engage in conduct which could result in serious physical injury.

(3) Battery in the first degree is a class B felony. [Acts 1975, No. 280, § 1601, p. 500.]

CRIMINAL PROCEDURE

43-2132. Argument of counsel — Order of argument. — If the case be not submitted without argument the party having the burden of proof, shall have the opening and conclusion of the argument, and if upon the demand of the adverse party, the attorney prosecuting for the State, or the attorney for the defense shall refuse to open and fully state the grounds on which he claims a verdict, the party so refusing shall be refused the conclusion of the argument. [Crim. Code, § 226; Act Mar. 6, 1877, No. 35, § 1, p. 30; C. & M. Dig., § 3185; Pope's Dig., § 4021.]